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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHARLES T. ROBINSON,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Charles T. Robinson, Sr. (hereinafter referred to as "Robinson"), Plaintiff in the District Court and Petitioner.

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent (hereinafter referred to as "Shell").

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended? i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

CITATION OF OPINIONS 3

JURISDICTIONAL STATEMENT 3

APPLICABLE STATUTE 4

STATEMENT OF THE CASE 5

A. THE CHARGE OF DISCRIMINATION . . 5

B. THE CHARGE OF RETALIATION 5

1. PROCEEDINGS BEFORE THE DISTRICT COURT 6

2. PROCEEDINGS BEFORE A PANEL OF THE FOURTH CIRCUIT 7

3. PROCEEDINGS BEFORE THE FOURTH CIRCUIT EN BANC 8

4. PROCEEDINGS BEFORE THE SUPREME COURT 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retailiation allegedly occurring after the employment relationship has ended? 11

A. This case should be decided under the normal rules of statutory construction. 11

B. "His employees," as used in § 704(a), is not ambiguous. 13

1. "Individual" and "employee" are used differently in Title VII. 13

2. Decisions by the Court interpreting other statutes and by the Courts of Appeal interpreting § 704(a) are not controlling. 16

3. "Employee" is not used differently in other sections of Title VII. 21

a. "Employee" is not used to designate former employees. 22

b. "Employee" is not used to designate future employees. 23

c. "Employee" is used to designate current employees. 23

4. "An individual employed by an employer" is not ambiguous. 24

C. The text and purpose of Title VII do not demand that former employees be protected by § 704(a). 25

1. Former employees are protected by statutory and common law remedies. 27

a. Federal and state laws as well as common law causes of action adequately protect former employees. . . . 28

b. A false employment reference can form a basis for a cause of action for defamation. 29

c. Section 704(a) provides a cause of action against prospective employers. 30

2. The original remedies available under Title VII and the limitations period indicate that § 704(a) should not apply to former employees. 31

3. There are differences between § 703(a) and § 704(a). 34

D. The protection of former employees under § 704(a) would conflict with state laws and lead to absurd results. 37

1. The expansion of § 704(a) would conflict with state laws protecting employment references. . . 37

2. The expansion of § 704(a) would conflict with the law of defamation. . 38

3. The expansion of § 704(a) would lead to absurd results. 39

CONCLUSION 41

TABLE OF AUTHORITIES

CASES **PAGE**

Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division, 404 U.S. 157 (1971) 17

BFP v. Resolution Trust Corporation, __ U.S. __, 114 S.Ct. 1757, 1771 (1994) 24

Bagwell v. Peninsula Regional Medical Center, 106 Md. App. 470, 665 A.2d 297, *cert. denied* 341 Md. 172, 669 A.2d 1360 (1995) 28

Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) 20

California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) 17

Caminetti v. United States, 242 U.S. 470, 485 (1917) 11

Charlton v. Paramus Board of Education, 25 F.3d 194, 198-200 (3rd Cir. 1994) 20

Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 159 (1993) 24

Crooks v. Harrelson, 282 U.S. 55, 60 (1930) 12

Delaware State College v. Ricks, 449 U.S. 250 (1980) 32

Director, Office of Workers Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company, __ U.S. __, 115 S.Ct. 1278 (1995) 25

Equal Employment Opportunity Commission v. Cosmair, Inc., L'Oreal Hair Care Division, 821 F.2d 1085, 1088 (5th Cir. 1987) 20

Equal Employment Opportunity Commission v. J.M. Huber Corporation, 927 F.2d 1322 (5th Cir. 1991) 20

Fresh v. Cutter, 73 Md. 87 (1890) 38

Hishon v. King & Spaulding, 467 U.S. 69 (1984) . . . 35

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) 17

Holder v. Hall, __ U.S. __, 114 S.Ct. 2581 (1994) 33

Humphrey v. Herridge, 103 Md. App. 238, 653 A.2d 491 (1995) 28

Iselin v. United States, 270 U.S. 245 (1926) 41

Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) 29

K-Mart Corporation v. Cartier, Inc., 486 U.S. 281, 291 (1988) 11

K-Mart Corporation v. Salmon, 76 Md. App. 568, 547 A.2d 1069 (1988) 28

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) 11

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 17

National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944) 17

Nelson v. Upsala College, 51 F.3d 383, 388 (3rd Cir. 1995) 29, 32

O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1981) 20

Pantchenko v. C.B. Dolge Company, Inc., 581 F.2d 1052, 1055 (2nd Cir. 1978) 20

Passer v. American Chemical Society, 935 F.2d 322, 331 (D.C Cir. 1991) 20, 32

Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 7

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 25

Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991) 21

Russello v. United States, 464 U.S. 16, 20 (1983) . . . 12

Rutherford v. American Bank of Commerce,
565 F.2d 1162, 1165 (10th Cir. 1977) 19, 20

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235, 240-41 (1989) 11

Veprinsky v. Fluor Daniel, Inc.,
___ F.3d ___, 1996 WL 34821
(7th Cir. 1996) 21, 22, 29, 32

STATUTES

Federal

2 U.S.C. § 1301(4), The Congressional
Accountability Act of 1995 15

5 U.S.C. § 1212(a)(1), The Whistleblower
Protection Act of 1989 16

5 U.S.C. § 1213(a)(1), The Whistleblower
Protection Act of 1989 16

5 U.S.C. § 1214(a)(3), The Whistleblower
Protection Act of 1989 16

5 U.S.C. § 1221, The Whistleblower
Protection Act of 1989 16

12 U.S.C. § 1790b(b), The Federal Credit Union Act . 16

12 U.S.C. § 1831j, The Federal
Deposit Insurance Corporation Act 16

26 U.S.C. § 79(e), The Internal Revenue Code 16

26 U.S.C. § 5000(b), The Internal Revenue Code . . . 16

26 U.S.C. § 6096, The Internal Revenue Code 16

28 U.S.C. § 1254(1) 3

29 U.S.C. § 151, *et seq.*, The National
Labor Relations Act 17

29 U.S.C. § 158(a)(3), The National
Labor Relations Act, § 8(a)(3) 28

29 U.S.C. § 657(c)(3), The Occupational
Safety and Health Act 16

29 U.S.C. § 621, *et seq.*, The Age
Discrimination in Employment Act 25

29 U.S.C. § 623(a)(1), The Age
Discrimination in Employment Act 25

29 U.S.C. § 623(d), The Age
Discrimination in Employment Act 20

29 U.S.C. § 1001, *et seq.*, The Employee
Retirement Income Security Act of 1974 28

29 U.S.C. § 2615, The Family and
Medical Leave Act of 1993 15

42 U.S.C. § 503(a)(1), The Social Security Act 17

42 U.S.C. § 1981a, *et cetera*,
The Civil Rights Act of 1991 15

42 U.S.C. § 2000e, The Civil Rights Act of 1964, Title VII § 701 23

42 U.S.C. § 2000e(b), The Civil Rights Act of 1964, Title VII § 701(b) 23

42 U.S.C. § 2000e(f), The Civil Rights Act of 1964, Title VII § 701(f) 13

42 U.S.C. § 2000e-2, The Civil Rights Act of 1964, Title VII § 703 13

42 U.S.C. § 2000e-2(a)(1), The Civil Rights Act of 1964, Title VII § 703(a)(1) 14

42 U.S.C. § 2000e-2(a)(2), The Civil Rights Act of 1964, Title VII § 703(a)(2) 14

42 U.S.C. § 2000e-2(c)(1), The Civil Rights Act of 1964, Title VII § 703(c)(1) 14

42 U.S.C. § 2000e-2(c)(2), The Civil Rights Act of 1964, Title VII § 703(c)(2) 14

42 U.S.C. § 2000e-2(e), The Civil Rights Act of 1964, Title VII § 703(e) 23

42 U.S.C. § 2000e-3(a), The Civil Rights Act of 1964, Title VII § 704(a) . . . . . *passim*

42 U.S.C. § 2000e-5(b), The Civil Rights Act of 1964, Title VII § 706(b) 22

42 U.S.C. § 2000e-5(e)(1), The Civil Rights Act of 1964, Title VII § 706(e)(1) 32

42 U.S.C. § 2000e-5(g), The Civil Rights Act of 1964, Title VII § 706(g) 40

42 U.S.C. § 2000e-5(g)(1), The Civil Rights Act of 1964, Title VII § 706(g)(1) 22

42 U.S.C. § 2000e-8(e), The Civil Rights Act of 1964, Title VII § 709(e) 22

42 U.S.C. § 2000e-13, The Civil Rights Act of 1964, Title VII § 714 22

42 U.S.C. § 2000e-16, The Civil Rights Act of 1964, Title VII § 717 22

42 U.S.C. § 12203, The Americans with Disabilities Act of 1990 15

State

Alaska Stat. § 09.65.160 (1993) 37

Ariz. Rev. Stat. Ann. § 23-1361 (1987) 37

Cal. Government Code § 1031.1 (West 1993) 37

Fla. Stat. § 768.095 (1991) 37

Ga. Code § 34-1-4 (1993) 37

Kan. Stat. Ann. § 44-119a (1995) 37

La. Rev. Stat. Ann. § 291 (West 1995) 37

Me. Rev. Stat. Ann. tit. 26 § 598 (1995) 37

N.M. Stat. Ann. § 50-12-1 (1995) 37

Okla. Stat. Ann. tit. 40, § 61 (West 1995) 37

Tenn. Code Ann. § 50-1-105 (1995) 37

RULES

12 (b)(6), Federal Rules of Civil Procedure 6

LEGISLATIVE MATERIALS

110 Cong. Rec. 7216 (1964)
(Response to Sen. Dirksen Memorandum) 34

NEWSPAPERS

McMorris, *Ex-Bosses Face Less Peril Giving Honest Job References,* Wall St.J., July 8, 1996, at B1 37

INTRODUCTION

This case involves the proper interpretation of a federal statute. Title VII § 704(a) of the Civil Rights Act of 1964,[2] declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. Does a person who is not an "employee or applicant for employment" have a cause of action under this statute against his former employer?

This case was filed in the United States District Court for the District of Maryland on January 4, 1993.[3] The District Court, Chief District Judge J. Frederick Motz presiding, granted a Motion to Dismiss on April 8, 1993, and entered an order dismissing the case. Robinson filed a Notice of Appeal on May 6, 1993.

On January 18, 1995, a panel of the United States Court of Appeals for the Fourth Circuit issued an Opinion reversing the judgment of the District Court and remanding the case for further proceedings.

On March 1, 1995, the Fourth Circuit granted Shell's Petition for Rehearing En Banc. On November 29, 1995, the Fourth Circuit issued an En Banc Opinion affirming the dismissal by the District Court.

Robinson filed a Petition for Writ of Certiorari on February 27, 1996. The Petition was granted on April 22, 1996, and Robinson filed the Brief for the Petitioner on June 21, 1996.

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2 42 U.S.C. § 2000e-3(a).

3 The Complaint listed three individuals in addition to Shell as Defendants. Robinson did not appeal the dismissal as to these individuals and they are no longer in this case.

In the Brief for Petitioner, Robinson argues that the term "employees" as used in § 704(a) is ambiguous and should be interpreted liberally to include former employees. The term "employee" is not ambiguous. The statute should not be given a strained construction to include former employees.

CITATION OF OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit, sitting En Banc, issued on November 29, 1995, affirming the judgment in favor of Shell, is published at 70 F.3d 325.

The earlier Opinion of the panel of the United States Court of Appeals for the Fourth Circuit, issued on January 18, 1995, reversing the judgment in favor of Shell and remanding the case, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the District of Maryland, issued on April 8, 1993, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to review this case under 28 U.S.C. § 1254(1). The opinion of the Fourth Circuit issued on November 29, 1995. The Petitioner timely filed a Petition for Writ of Certiorari on February 27, 1996.

APPLICABLE STATUTE

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprentice-ship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. THE CHARGE OF DISCRIMINATION

Robinson is a former Territory Sales Representative in Shell's Mid Atlantic Retail Marketing District. His employment was terminated effective October 13, 1991 under a severance program. Following termination of his employment, Robinson filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "E.E.O.C."). Robinson alleged that he had been fired on the basis of his race (Black).

The charge of discrimination resulted in a lawsuit, *Robinson v. Shell Oil Company*, Civil Action No. JFM 93-29 in the United States District Court for the District of Maryland. The suit was tried before the court, Chief District Judge J. Frederick Motz presiding, in April, 1994. At the conclusion of the trial, Judge Motz entered a judgment in favor of Shell. There was no race discrimination. Robinson did not appeal that judgment.

B. THE CHARGE OF RETALIATION

In February 1992, four months after he had been severed from Shell, Robinson applied for a job as an Insurance Account Representative with Metropolitan Life Insurance Company. On February 28, 1992, Metropolitan Life wrote a letter to Shell requesting information regarding Robinson's prior employment.

The form letter requested Robinson's period of employment, job position, job description, and weekly salary. The form also asked Shell to rate Robinson's attendance as "perfect, excellent, average, or poor." Shell was also asked whether Robinson left employment voluntarily

and whether it would rehire him. Finally, Shell was asked to rate Robinson in ten categories as "above average, average, or below average."

Ross Fava, Sales Manager for Shell, completed the form on March 2, 1992, stating Robinson did not leave the employment voluntarily but was terminated on October 13, 1991. He also rated Robinson's attendance as "poor" and stated that Shell would not rehire him. Finally, Fava rated Robinson as "below average" in nine of the ten categories.

On March 10, 1992, Robinson filed a second charge with the E.E.O.C. This time Robinson asserted that Shell had given him a poor employment reference because he had previously filed a charge of discrimination against Shell. In sum, Robinson alleged that Shell had retaliated against him for filing his charge of discrimination in violation of the anti-retaliation provision of the Civil Rights Act of 1964, Title VII § 704(a).

The charge of retaliation resulted in the present lawsuit.

1. PROCEEDINGS BEFORE THE DISTRICT COURT

On January 4, 1993, Robinson filed this suit in the United States District Court for the District of Maryland. This case was also assigned to Chief District Judge Motz. Robinson claimed that Shell had retaliated against him by "providing false information and negative job references to perspective (sic) employers."

On March 23, 1993, Shell filed a Motion to Dismiss in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Shell posited that Robinson was not

employed by Shell at the time the employment reference was made and, therefore, § 704(a) did not apply.

Shell relied upon the case of *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048, in filing its motion to dismiss. The Fourth Circuit opinion in *Polsby*, issued on August 12, 1992, held that the plain wording of § 704(a) applied to "employees or applicants for employment," and not to former employees.

On April 8, 1993, in reliance on *Polsby*, Chief District Judge Motz granted Shell's Motion to Dismiss and entered an order dismissing the case.

On April 26, 1993, the Supreme Court vacated the Fourth Circuit's judgment in *Polsby* and remanded the case "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." The Court did not address the merits of the Fourth Circuit opinion.

On May 6, 1993, Robinson filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

2. PROCEEDINGS BEFORE A PANEL OF THE FOURTH CIRCUIT

Robinson's appeal was argued before a panel comprised of Circuit Judges Hall, Hamilton, and Michael of the Fourth Circuit on September 28, 1994. On January 18, 1995, Judge Hall, writing for the majority of the panel, reversed the judgment of the District Court and remanded the case for further proceedings. Judge Hamilton filed a dissent.

On January 30, 1995, Shell filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On March 1, 1995, the Fourth Circuit vacated the panel decision and granted rehearing en banc.

3. PROCEEDINGS BEFORE THE FOURTH CIRCUIT EN BANC

The appeal was reargued before the Fourth Circuit sitting en banc on September 26, 1995. On November 29, 1995, Judge Hamilton, writing for the majority of the Court, affirmed the judgment of the District Court. Judge Hall filed a dissent, as did Judge Murnaghan.

4. PROCEEDINGS BEFORE THE SUPREME COURT

On February 27, 1996, Robinson filed a Petition for Writ of Certiorari with this Court. The petition was granted on April 22, 1996.

SUMMARY OF THE ARGUMENT

Under the normal rules of statutory construction this case should be affirmed. The language of § 704(a) is clear and unambiguous. Employers are prohibited from retaliating against "his employees and applicants for employment." Former employees are not included within the protection of § 704(a).

Robinson realizes that the plain wording of the statute excludes former employees. Therefore he attempts to convince the Court that the word "employee" is ambiguous by pointing to the use of the word in other statutes and supposed inconsistencies within Title VII. These arguments are futile. "Employee" must be understood within the context of Title VII. Title VII consistently uses "employee" to refer to current employees.

Robinson hopes to build on the supposed ambiguity of "employee" to convince the Court that the text and purpose of Title VII demand that "employee" be read to mean current and former employees. Robinson is wrong. The exclusion of former employees from § 704(a) does not conflict with the text or purpose of Title VII.

Congress used different language to describe retaliation and discrimination. There are legitimate reasons for offering more protection against discrimination than retaliation. Former employees are adequately protected from retaliation by former employers under federal and state statutes as well as common law causes of action. Therefore, Congress chose to provide a cause of action for retaliation for former employees, as "applicants for employment," only against prospective employers. Additionally, the original remedies section and the short limitations period within Title VII indicate an intention by Congress to limit claims of

retaliation to acts occurring during employment.

Rewriting § 704(a) to protect former employees from retaliation by their former employers would conflict with recent state legislation protecting employment references. It would also conflict with the established common law cause of action for defamation. Disgruntled former employees could sue former employers over employment references even if the references are true and the employer has complied with state law.

This will lead to absurd results, such as this case. Shell has already proven, in the first suit filed by Robinson, that the statements in the employment reference were true and that Shell had good reason for firing Robinson. Now Robinson wants to stop Shell from responding to a request for information by criticizing his past performance. Should a former employee be protected from a truthful employment reference?

ARGUMENT

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

A. This case should be decided under the normal rules of statutory construction.

Any case involving the proper interpretation of a statute must begin by examining the statutory language. Words therein should be interpreted according to their common usage. Courts are not free to read into a law what is not there. *K-Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

If a statute contains both specific and general provisions, it is a commonplace of statutory construction that the specific governs the general. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

If the statutory language is unambiguous and the statutory scheme is coherent and consistent, interpretation is unnecessary. The sole function of the court is to enforce the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

There are only two exceptions when a court may stray from the plain language of an unambiguous statute. The first is when literal application of the statute would lead to an absurd result. This exception applies only under rare and exceptional circumstances. The absurdity must be so gross as to shock the general moral or common sense and there must be something to make plain Congress' intent that the

apparent letter of the law cannot prevail. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The second exception is when literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress. This exception applies only when the contrary intent is clearly expressed by the legislative body. *Russello v. United States*, 464 U.S. 16, 20 (1983). In such cases, the intention of the legislature, rather than the language of the statute, controls. In the absence of express Congressional intent, a court must assume that Congress intended to convey the language's ordinary meaning.

Robinson does not disagree with any of these rules of statutory construction. Instead, he offers three arguments for interpreting the term "his employees" to include someone no longer employed by the employer.

First, Robinson argues that the term is inherently ambiguous. Robinson attempts to find ambiguity in § 704(a) by examining other decisions that have interpreted the term "employee," by reviewing other sections of Title VII, and by a pedantic discourse on the word "employed."

Second, Robinson relies on Title VII's purpose to declare that the Court is duty bound to construe "his employees" to include former employees.

Third, Robinson argues that a liberal construction of § 704(a) would be consistent with the interpretation of other anti-retaliation laws.

B. "His employees," as used in § 704(a), is not ambiguous.

1. "Individual" and "employee" are used differently in Title VII.

Title VII defines "employee" as "an individual employed by an employer" in § 701(f).[4] This definition is not entirely circular. It indicates a distinction between "individuals" and "employees," a distinction used in § 704(a).

Section 704(a) uses four nouns to describe persons protected against retaliation: "individual," "member," "applicant," and "employee." The term "employee," in context, is definitive and directly tied to the employment relationship.

Employment agencies and joint labor-management committees are prohibited from retaliating against any "individual." Labor organizations are prohibited from retaliating against any "member" or "applicant for membership." Employers are prohibited from retaliating against any of "his employees or applicants for employment."

Similarly, the anti-discrimination section, § 703,[5] incorporates a distinction between "individuals" and "employees or applicants for employment":

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[4] 42 U.S.C. § 2000e(f).

[5] 42 U.S.C. § 2000e-2.

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify *his employees or applicants for employment* in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* race, color, religion, sex, or national origin.
§ 703(a) (emphasis added).

Obviously, "individual" is used as a broader term than "employee" or "applicant for employment." "Employee" is a status that can be attained by an "individual." The duties of an employer toward "individuals" are different than those toward an "employee or applicant for employment." These obligations are contained in different sections; i.e., § 703(a)(1) and § 703(a)(2). This distinction is repeated with regard to labor organizations in § 703(c)(1)[6] and § 703(c)(2).[7]

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[6] 42 U.S.C. § 2000e-2(c)(1).
[7] 42 U.S.C. § 2000e-2(c)(2).

Robinson completely ignores the distinction between "individual" and "employee." Had Congress intended to prohibit retaliation by an employer against former employees it could have easily substituted the term "individual" for "his employees or applicants for employment" in § 704(a).

This is exactly what Congress has done in recent employment legislation. Both the Americans with Disabilities Act of 1990[8] and the Family and Medical Leave Act of 1993[9] prohibit retaliation against any "individual." There is no question that these statutes would protect former employees from retaliation. Significantly, both of these statutes were written at a time when Congress passed the Civil Rights Act of 1991.[10] The 1991 act dramatically changed the damages available under Title VII, the availability of a jury trial, and the burden of proof in some cases. There was no change to the wording of the anti-discrimination section or the anti-retaliation section. The terms "employee" and "individual" remained as before.

In the alternative, had Congress intended to prohibit retaliation by an employer against former employees it could have easily included the term "former employee" with "his employees or applicants for employment" in § 704(a).

This is exactly what Congress has done in other legislation when it wanted to include former employees within the protection of a statute; i.e., The Congressional Accountability Act of 1995[11] ("The term 'employee' includes an applicant for employment and a former

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[8] 42 U.S.C. § 12203.
[9] 29 U.S.C. § 2615.
[10] 42 U.S.C. § 1981a, *et cetera*.
[11] 2 U.S.C. § 1301(4).

employee."); The Whistleblower Protection Act of 1989[12] ("employee, former employee, or applicant for employment"); The Internal Revenue Code[13] ("For purposes of this subsection, the term 'officer or employee' includes a former officer or employee."); The Federal Credit Union Act[14] and The Federal Deposit Insurance Corporation Act[15] ("Any employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a)...."); and The Occupational Safety and Health Act[16] ("Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents.").

In light of these statutes, it can hardly be argued that the omission of former employees from the protection of § 704(a) was inadvertent or unforeseen. There is no ambiguity.

2. Decisions by the Court interpreting other statutes and by the Courts of Appeal interpreting § 704(a) are not controlling.

Nevertheless, Robinson attempts to find ambiguity in the word "employee" by focusing on interpretations of the word as it appears in other statutes. This is of little use in interpreting § 704(a). As Robinson acknowledges, the Court has recognized that "employee" is not a term of art with a definite meaning but takes its color from its surroundings in

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12 5 U.S.C. §§ 1212(a)(1), 1213(a)(1), 1214(a)(3), and 1221.
13 26 U.S.C. §§ 79(e), 5000(b), and 6096.
14 12 U.S.C. § 1790b(b).
15 12 U.S.C. § 1831j.
16 29 U.S.C. § 657(c)(3).

the particular statute. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944).

Robinson has found several instances where either a statute or the Court has used the term "employee" in a generic sense; i.e., as in a "worker." *See, e.g., Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967) (an individual who claimed that she had been wrongly discharged is referred to as an "employee" and as a "person" in an action seeking unemployment compensation benefits); *see also, Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) (another individual who had been discharged and challenged a denial of unemployment compensation benefits is referred to as an "employee"), and *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) (persons protected by § 303(a)(1) of the Social Security Act[17] are variously referred to as "claimants," "employees," "workers," "unemployed workers," and "people").

Similarly, *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157 (1971), cited by Robinson, also discusses the use of "employees" in a generic sense. The Court held that a mid-term unilateral modification by an employer of pension benefits for retired employees was not an unfair labor practice because retired employees were not covered by the National Labor Relations Act.[18] The Court noted that neither the purpose nor the legislative history of the N.L.R.A. indicated that retired employees were to be included within the coverage of the act.

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17 42 U.S.C. § 503(a)(1).
18 29 U.S.C. § 151, *et seq.*

"The Act, after all, as § 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers' -- not those who have retired from the workforce. The inequality of bargaining power that Congress sought to remedy was that of the 'working' man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

> To the contrary, the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire."
> 404 U.S. at 166.

The Court distinguished prior National Labor Relations Board decisions involving applicants for employment by making it clear that "employees" was used generically within the N.L.R.A. to indicate members of the general work force.

> "Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls -- who have never been hired in the first place -- as well as persons who have quit or whose employers have gone out of business are 'employees'

> embraced by the policies of the Act. Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as 'employees.' No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.'"
> 404 U.S. at 168 (citation omitted).

This hardly means that "employee" was used in a generic sense in Title VII. If it had been, there would have been no need to use the all-embracing term "individual" or the more restrictive terms "member" and "applicant."

If the Court were to accept Robinson's suggestion that "employee" can be read as a generic reference, there is the further limitation of the adjective "his." Employers are prohibited from retaliating against "his employees," not employees in general. If a person no longer works for his former employer, he is not one of "his employees" even if he is still a member of the active work force.

Naturally, Robinson also relies on the decisions of the Courts of Appeals that are in conflict with the Fourth Circuit decision in this case. That reliance is misplaced. These contrary decisions were based on broad policy considerations. Each of these decisions totally disregarded, without explanation, the established analytical framework for statutory construction.

In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977), the Tenth Circuit stated merely that a literal reading of the statute would result in a

narrow interpretation not justified by its legislative history. The court did not cite anything in the Congressional record regarding legislative history. Instead, the court merely opined that a remedial statute should be liberally construed.

The Second Circuit relied on *Rutherford* and held that a narrow construction would not give effect to the statute's purpose. *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2nd Cir. 1978).

The Ninth Circuit offered no analysis when it mentioned in passing that an allegation of a bad recommendation after termination was sufficient to assert a retaliation claim. *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1981).

The Eleventh Circuit relied on the prior opinions by the Tenth and Second Circuits and held that a strict interpretation of the statute "would undercut the obvious remedial purposes of Title VII." *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988).

The Third,[19] D.C.,[20] and Fifth Circuits[21] have made similar pronouncements in cases involving the identical anti-retaliation provision in the Age Discrimination in Employment Act.[22]

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[19] *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994).

[20] *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C Cir. 1991).

[21] *Equal Employment Opportunity Commission v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085, 1088 (5th Cir. 1987). *Cosmair* was cited as the basis for the same holding under § 704(a) in *Equal Employment Opportunity Commission v. J.M. Huber Corporation*, 927 F.2d 1322 (5th Cir. 1991).

[22] 29 U.S.C. § 623(d).

In *Veprinsky v. Fluor Daniel, Inc.*, __ F.3d __, 1996 WL 34821 (7th Cir. 1996), a decision not cited by Robinson but which supports his position, the Seventh Circuit clarified its prior decision in *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991). The Seventh Circuit held that § 704(a) did apply to former employees so long as the alleged retaliatory acts were related to the plaintiff's employment. The decision was based on familiar policy arguments and the rationale that, unless former employees are covered by § 704(a), a plaintiff could be fired in retaliation for a protected activity without recourse. This is nonsense. The plaintiff in that situation would be an "employee" at the time of the retaliatory act (the discharge) and would have standing to sue under § 704(a).

Neither the decisions of this Court construing other statutes nor the decisions of the Courts of Appeal construing § 704(a) is persuasive authority that "his employees," as used in § 704(a), is ambiguous.

3. "Employee" is not used differently in other sections of Title VII.

Robinson next attempts to convince the Court that the term "employee" is ambiguous by reviewing sections of Title VII, other than § 703 and § 704(a), that contain the term "employee." Robinson has combed the statute in an effort to show that "employee" was used to designate current, future, and former employees. Robinson's examples range from the fanciful to the farfetched.

a. "Employee" is not used to designate former employees.

Like the Seventh Circuit's recent decision in *Veprinsky v. Fluor Daniel, Inc., supra,* Robinson argues that since only an "employee and applicant for employment" can file a civil suit or is entitled to receive notification of final agency action under § 717,[23] then "employee" must include former employee or else a terminated employee would have no cause of action for discrimination. Robinson also points to § 706(g)(1)[24] which provides for reinstatement of "employees." Isn't the plaintiff in both situations an "employee" at the time of the adverse employment action; i.e. discharge?

Robinson cites the provisions of Title VII that restrict employees of the E.E.O.C. from disclosing certain information; i.e., § 706(b),[25] and § 709(e).[26] Robinson cites § 714[27] which establishes criminal penalties for actions taken against employees of the commission in the performance of their official duties. Even if these provisions do apply to persons after they have left the employment of the E.E.O.C., they have nothing whatever to do with the prohibitions on employers not to discriminate against individuals or to retaliate against "his employees."

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23 42 U.S.C. § 2000e-16.
24 42 U.S.C. § 2000e-5(g)(1).
25 42 U.S.C. § 2000e-5(b).
26 42 U.S.C. § 2000e-8(e).
27 42 U.S.C. § 2000e-13.

b. "Employee" is not used to designate future employees.

Robinson claims that "employees" must mean future employees in § 701[28] since both an "employment agency" and a "labor organization" are defined as entities that procure "employees." Robinson also points to § 703(e)[29] which allows an employer, under some circumstances, "to hire and employ employees" on the basis of religion, sex, or national origin. Robinson reasons that an individual cannot become an employee until he is actually employed. Therefore, an employment agency or labor organization cannot procure "employees" but only prospective or future employees. Similarly, he says that an employer does not hire "employees" but individuals who then become "employees." Such sophistic reasoning cannot be taken seriously. If "employee" includes individuals to be hired for future employment, then why does § 704(a) specifically protect "applicants for employment?"

c. "Employee" is used to designate current employees.

By contrast, "employee" is clearly used to designate current employees in § 701(b)[30] which defines an employer as an entity which has "fifteen or more employees." If "employee" is interpreted to include former employees it would cause a dramatic expansion of Title VII. No longer would small employers be exempt from the act. Any employer who had a total of 15 or more former employees would be subject to the act, regardless of the number of current employees. An employer with 5 active employees

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28 42 U.S.C. § 2000e.
29 42 U.S.C. § 2000e-2(e).
30 42 U.S.C. § 2000e(b).

but a high turn over would suddenly be subject to a 30 year old act that ostensibly provides an exemption for small businesses.

"Employee," as used in § 701(b), clearly refers to current employees. The same meaning should be used for "employee" in § 704(a). *See, e.g., Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 159 (1993) ("It is a 'normal rule of statutory construction' that identical words used in different parts of the same act are intended to have the same meaning."), and *BFP v. Resolution Trust Corporation*, __ U.S. __, 114 S.Ct. 1757, 1771 (1994) *dissent by Justice Souter* ("A common rule of construction calls for a single definition of a common term occurring in several places within a statute.").

4. "An individual employed by an employer" is not ambiguous.

Finally, Robinson is reduced to arguing that "employee" is ambiguous because Robinson cannot tell if the definition ("an individual employed by an employer") was written in the present tense, passive voice or the past tense in either the active or passive voice. In other words, when an employer is prohibited by law from taking certain actions against "his employees," Robinson cannot tell if the employer is prohibited from taking action against his present employees or against anyone who has ever been employed by him. Certainly, an employer would know the difference. An employer knows who "his employees" are.

In common usage, an individual who is no longer employed by a company never refers to himself as an "employee." Any individual knows immediately if he is employed. If an individual once worked at a company but does so no longer, he refers to himself as a former

employee, or ex-employee, or retiree. No former employee would mistakenly refer to himself as an "employee" of his former employer.

As an employer itself, Congress knows who its employees are. It is absurd to suggest that it is unclear what Congress meant by prohibiting an employer from retaliating against "his employees."[31]

C. The text and purpose of Title VII do not demand that former employees be protected by § 704(a).

Robinson begins his discussion of the purpose of Title VII by focusing on the importance of protecting individuals who bring violations of the law to the attention of federal officials. While this is certainly a worthwhile goal, it is no license for imposing new terms that do not appear in the statute. *Director, Office of Workers Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company*, __ U.S. __, 115 S.Ct. 1278 (1995).

> "Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally

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[31] It is also ridiculous to suggest that the Court would have to repudiate portions of *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), unless it expands § 704(a) to include former employees. *Betts* considered whether a retirement system adopted by the state of Ohio violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq.*, by discriminating against employees on account of age. Robinson argues that *Betts* would have to be repudiated because the ADEA uses the same definition of employee as Title VII. Not only is the term "employee" not in issue in *Betts*, Robinson ignores the fact that the ADEA, like Title VII, prohibits discrimination against "individuals." 29 U.S.C. § 623(a)(1).

construed to achieve its purpose. That principle may be invoked, in case of ambiguity, *to find present rather than absent elements* that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means -- and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two."
115 S.Ct. at 1288 (citation omitted, emphasis added).

It is not necessary to effectuate the purpose of § 704(a) that former employees be included in its protection. Section 704(a) protects two classes of persons against retaliation by an employer: his employees and applicants for employment. Neither of these two classes would be affected by a decision by this Court not to expand the protection to a third class of former employees. Employees will still be able to sue their employers for retaliation. Applicants for employment will still be able to sue their prospective employers for retaliation. The rights of those specifically named in the statute will be unaffected.

If mere consistency with the purpose of Title VII were enough to expand the protection of § 704(a) to former employees, then why stop there? Why not declare that an employer cannot retaliate against *anyone*? Surely the policy arguments in favor of an anti-retaliation statute are the same for anyone exercising a right under Title VII. However, the Court cannot second-guess Congress' decision to not write such a broad act.

1. Former employees are protected by statutory and common law remedies.

Robinson raises the specter of unrestrained revenge should the Court decline to expand the coverage of § 704(a).

> "Blacklisting is not the only or necessarily the worst form of reprisal that an employer could inflict on a former employee. Employers might cut off a former employee's severance payments or medical insurance, block disbursement of funds owed to the former employee in an employee benefit plan, seek the revocation of the individual's teaching certificate or other professional license, forbid a nurse to work for any doctor practicing in a hospital, arrange to have the charging party removed from civil service eligibility lists, persuade a subsequent employer to dismiss the charging party, file a baseless civil suit, orchestrate a groundless arrest and criminal prosecution of a charging party, or even resort to physical violence."
> Brief for Petitioner at p. 26 - 27.

Robinson ignores the fact that former employees are already protected from each of the abuses listed by statutory and common law remedies.

a. Federal and state laws as well as common law causes of action adequately protect former employees.

Blacklisting is prohibited by the National Labor Relations Act.[32]

Severance payments, medical benefits and other employee benefit plans are protected by the Employee Retirement Income Security Act of 1974.[33]

Attempts to revoke a license or block hospital privileges are actionable under the common law causes of action for intentional interference with a prospective business advantage or intentional interference with contractual relations. [34]

Baseless civil suits, arrests and criminal prosecutions are all actionable under the common law causes of action for abuse of process[35] and malicious prosecution.[36]

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32 29 U.S.C. § 158(a)(3).

33 29 U.S.C. § 1001, *et seq.*

34 The elements of these causes of action in Maryland, where this case arose, are listed in *Bagwell v. Peninsula Regional Medical Center*, 106 Md. App. 470, 665 A.2d 297, *cert. denied* 341 Md. 172, 669 A.2d 1360 (1995).

35 The elements of this cause of action are listed in *Humphrey v. Herridge*, 103 Md. App. 238, 653 A.2d 491 (1995).

36 The elements of this cause of action are listed in *K-Mart Corporation v. Salmon*, 76 Md. App. 568, 547 A.2d 1069 (1988).

Physical violence is actionable under the common law torts of assault and battery.[37]

Of course, the most obvious remedies available to a former employee who believes that his former employer has issued a false job reference are contained in a cause of action for defamation and in § 704(a) itself.

b. A false employment reference can form a basis for a cause of action for defamation.

Robinson could have sued Shell for defamation for giving a reference to a prospective employer that contained false information.[38] Of course, Robinson would have had to prove that the statements made by Shell to Metropolitan Life Insurance Company were false. This would have been difficult, if not impossible, given the outcome of Robinson's first suit against Shell.

Robinson originally sued Shell following the termination of his employment. He alleged that Shell had fired him on the basis of his race in violation of § 703. That suit was tried in the United States District Court for the District of Maryland in April, 1994, and resulted in a judgment in favor of Shell. As a necessary part of the

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37 Interestingly, one of the Courts of Appeal that has held that former employees are protected by § 704(a) has not been willing to expand that protection to cover physical acts. *Nelson v. Upsala College*, 51 F.3d 383, 388 (3rd Cir. 1995) ("For instance, if an employer physically assaults a former employee or burns down her house in retaliation for the employee having brought a Title VII charge, relief might not be available under § 704."). *See also, Veprinsky v. Fluor Daniel, Inc., supra* at 11.

38 *See, e.g., Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

defense of that case, Shell presented evidence on the reasons for termination. The reasons for termination included poor attendance and below average performance in each of the following categories: performance of duties, ability to work harmoniously with others, ability to work conscientiously and for long hours away from close supervision, sincerity and integrity, moral habits, ability to live within his means or meet his obligations, judgment and quick thinking abilities, trustworthiness in handling money, and effectiveness in making sales.

The District Court found that Shell had articulated legitimate, non-discriminatory reasons for firing Robinson. There was no evidence that the reasons articulated were a pretext for race discrimination. There was no appeal of that case.

Therefore, the reasons for Robinson's dismissal have already been litigated and proven true. The reasons for termination were the basis for Shell's response to the reference check by Metropolitan Life.

c. Section 704(a) provides a cause of action against prospective employers.

Even § 704(a) offers protection to former employees once they apply for another job. If (i) a person applies for a job with a new employer, (ii) the old employer tells the new employer that the person opposed an unlawful employment practice, made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing, and (iii) the new employer rejects the person for the job on the basis of that information, then the person would have a cause of action under § 704(a) against the new

employer. The person would be an "applicant for employment" and clearly protected by § 704(a) against retaliation by the *new employer*.

Of course, Robinson would have had problems suing Metropolitan Life under § 704(a) for rejecting his application for employment based on the information supplied by Shell. Even though Robinson would have had standing to bring such an action as an "applicant for employment," the reference by Shell made no mention of any activity by Robinson protected by Title VII.

In the context of employment references, Congress chose to offer protection to former employees only against retaliation by future employers. Such protection is consistent with the remedies originally available under Title VII.

2. The original remedies available under Title VII and the limitations period indicate that § 704(a) should not apply to former employees.

Title VII originally provided only equitable relief such as reinstatement, back pay, and injunctions against further violations. These equitable remedies were particularly suited to making a complainant whole without penalizing the employer. Congress did not intend to punish employers by imposing large monetary awards. In successful Title VII actions, an applicant would be hired; an employee would be promoted or reinstated to a job that was denied. However, it is much more difficult to fashion equitable relief for a former employee.

Since the remedies available under Title VII are not suited for post-employment events, those courts that have recognized a cause of action for former employees have been

forced into hair-splitting decisions over what is "reasonably related to the employment." For example, the District of Columbia Circuit has held that the cancellation of a symposium in honor of a former employee could be an act of retaliation that stated a claim for relief under § 704(a).[39] However, the Third Circuit has held that barring a former employee from the work place is not reasonably related to the employment so as to form a basis for a claim of retaliation under § 704(a).[40] Both decisions seem to be influenced by the ability of the court to fashion relief for the alleged harm.

Expansion of § 704(a) would also create a cause of action at odds with the strict limitations period applied to other Title VII actions. Under § 706(e)(1)[41] a person claiming to be aggrieved must file a charge within 180 days (in some cases, 300 days) of the alleged unlawful employment practice. This limitations period begins to run when the unlawful employment practice occurs. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). This short limitations period indicates an intention by Congress to quickly resolve employment disputes. However, if § 704(a) is expanded to include former employees, a charge of retaliation could be filed years after the employment relationship has ended. As pointed out by Circuit Judge Manion in dissent in *Veprinsky v. Fluor Daniel, Inc., supra*, it is logical to conclude that Congress intended to end all claims at the termination of employment.

> "Moreover, contrary to statements by this and other courts that Congress just could not have intended to leave former employees

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39 *Passer v. American Chemical Society, supra.*

40 *Nelson v. Upsala College, supra.*

41 42 U.S.C. § 2000e-5(e)(1).

> unprotected, ante at 21-22, there are good reasons for their exclusion. Had Congress defined "employee" to include both those "employed" as well as those "formerly employed," it would have created a cause of action unlimited in time. A cause of action for retaliation could be brought one, five, or even twenty years after the job ended (since the cause of action would not accrue until the alleged retaliation occurred). Congress had to draw a line. It did so at the most logical point - the end of the employment relationship. In effect, § 704 works as a statute of repose. Just like a statute of repose, one day an individual has a claim and the next he does not. No more than a statute of repose, this is not 'grossly absurd or a plainly unintended result.'"
> 1996 WL 348212 at 18.

Therefore, both the original remedies available under Title VII and the limitations period for filing a charge indicate that Congress did not intend to include former employees within the protection of § 704(a).

This conclusion is not undermined by the legislative history. Robinson has cited two instances where a reference is made to retaliation against a *person*. This is broader language than Congress chose in the final version of the statute. As discussed previously, there is no indication that "his employees" was meant to be a generic reference to all workers. Any conflict between statements in the legislative history and the statute itself must be resolved in favor of the statutory language. *Holder v. Hall*, __ U.S. __, 114 S.Ct. 2581, 2613 (1994) *concurring opinion by Justice Thomas* ("I would have thought the key to resolving any such conflict

between the text and the legislative history obvious: the text of the statute must control ....").

The legislative history does indicate that "employer" was meant to have its normal and customary meaning.

> "Question. Who is an employer within the meaning of Title VII? I am not sure, the bill is indefinite. We have no committee hearings to report. Can an employer readily ascertain from the language of the bill whether or not he is included? Employers with a large number of employees will have no difficulty, but what of the small businessman?
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> Answer. The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the act."
> 110 Cong. Rec. 7216 (1964) (Response to Sen. Dirksen Memorandum).

It would seem appropriate, therefore, that "employee" also be given its normal and customary meaning.

3. There are differences between § 703(a) and § 704(a).

Robinson characterizes an employment reference as an employment benefit that accrues after the termination of employment. Therefore, he argues, since a former employee *alleging discrimination* in the denial of a post-employment benefit could file suit under § 703(a), a former employee *alleging retaliation* in the denial of a post-employment benefit should be able to file suit under § 704(a).

This argument is based on *Hishon v. King & Spaulding*, 467 U.S. 69 (1984). In *Hishon*, a female associate at a law firm alleged that she had been rejected for partner on the basis of her sex in violation of § 703(a). The Court held that consideration for partnership was a benefit or privilege of employment and, therefore, could not be withheld on the basis of race, color, religion, sex, or national origin.

The Court rejected the argument that consideration for partnership could not be a benefit of employment since the associate would have to terminate her employment as an associate in order to become a partner. The Court held that it was of no consequence that employment as an associate necessarily ends when an associate becomes a partner.

> "A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship."
> 467 U.S. at 77.

If an employment reference is considered a benefit of employment, that benefit could not be withheld on a discriminatory basis under § 703(a).

Robinson wants to apply the same logic to § 704(a). If an employer could not deny this benefit to a person alleging discrimination, why should an employer be able to deny this benefit to a person alleging retaliation?

This argument ignores the wording of both § 703(a) and § 704(a). As discussed previously, *individuals* are protected against discrimination with respect to "compensation, terms, conditions, or privileges of employment" under § 703(a)(1). Section 704(a) only

prohibits an employer from retaliating against "his employees and applicants for employment." "Individual" is broad enough to encompass former employees. "Employees" is not.

There are also valid policy reasons that would explain why Title VII offers more protection to persons alleging discrimination than it does to persons alleging retaliation. At the time Title VII was passed there was no remedy available to persons who alleged that they were denied a job on the basis of their race, color, religion, sex, or national origin. Title VII was passed to protect such individuals. Title VII is not a general tort statute. It is an employment law statute. It does not protect persons from discrimination outside of the workplace. The main purpose of Title VII is to allow an individual to apply for a job and receive the benefits of that job on a non-discriminatory basis.

Protection against retaliation is not the main purpose of Title VII. Retaliation is a secondary consideration in Title VII. Title VII does provide for protection against retaliation but on a more limited basis. Title VII provides protection against retaliation for employees while they are employed. Title VII provides protection against retaliation for applicants for employment against *prospective employers*. It is entirely possible that Congress thought it irrelevant or unnecessary to provide former employees protection against former employers. Former employees are not seeking employment from their old employer and are adequately protected by other statutory and common law remedies from anything a former employer might do to hinder their employment elsewhere.

D. The protection of former employees under § 704(a) would conflict with state laws and lead to absurd results.

Robinson recognizes the importance to employers of obtaining job references concerning applicants for employment. However, expanding § 704(a) to include former employees would conflict with state laws protecting employment references and lead to absurd results.

1. The expansion of § 704(a) would conflict with state laws protecting employment references.

Despite the obvious benefits of honest employment references to both employers and job seekers, employers are increasingly reluctant to provide references for fear of a suit by a disgruntled former employee. One survey has indicated that 63% of personnel managers refused to provide information about former employees for fear of landing in court.[42] To protect employers and encourage honest job references, several states in recent years have passed laws providing employers with varying degrees of protection against suits alleging defamation and other claims.[43]

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[42] McMorris, *Ex-Bosses Face Less Peril Giving Honest Job References*, Wall St. J., July 8, 1996, at B1, citing a 1995 study by the Society for Human Resource Management.

[43] See; e.g., Alaska Stat. § 09.65.160 (1993); Ariz. Rev. Stat. Ann. § 23-1361 (1987); Cal. Government Code § 1031.1 (West 1993); Fla. Stat. § 768.095 (1991); Ga. Code § 34-1-4 (1993); Kan. Stat. Ann. § 44-119a (1995); La. Rev. Stat. Ann. § 291 (West 1995); Me. Rev. Stat. Ann. tit. 26 § 598 (1995); N.M. Stat. Ann. § 50-12-1 (1995); Okla. Stat. Ann. tit. 40, § 61 (West 1995); and Tenn. Code Ann. § 50-1-105 (1995). Similar bills are pending in Wisconsin and Illinois.

Obviously, expanding § 704(a) to include former employees would conflict with these laws wherever the claim of retaliation is based upon an employment reference.

2. The expansion of § 704(a) would conflict with the law of defamation.

Expansion of § 704(a) would also lead to conflicts with the common law cause of action for defamation. As discussed previously, truth is an absolute defense to any claim of defamation. In the context of an employment reference, any statement made by a former employer regarding an ex-employee cannot form the basis for a claim of defamation if the statement is true. Under a claim of retaliation in violation of § 704(a), however, truth is irrelevant. It would make no difference if the employment reference contains true statements. A disgruntled ex-employee could still allege that the motivation for issuing the reference was retaliation. Employers could be accused of retaliation even if they did no more than speak truthfully about an ex-employee.

Similarly, most states recognize a qualified privilege for employers to communicate with other employers regarding employment references.[44] These communications are entitled to a privilege unless they are made with reckless disregard for the truth or with actual knowledge of its falsity. Under a claim of retaliation in violation of § 704(a), however, the knowledge or standard of care of the employer is irrelevant. It would make no difference if the employer has acted carefully to ascertain the truth of the reference. A disgruntled ex-employee could still allege that the motivation

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[44] See, e g., *Fresh v. Cutter*, 73 Md. 87 (1890).

for issuing the reference was retaliation. Employers could be accused of retaliation no matter how carefully they checked the truth of a reference.

3. The expansion of § 704(a) would lead to absurd results.

One does not have to construct convoluted hypothetical situations to demonstrate that expansion of § 704(a) to include former employees would lead to absurd results. All one has to do is examine the facts of the two suits brought by Robinson against Shell.

Robinson has already sued Shell over the termination of his employment and lost. As part of the defense of that case, Shell proved that Robinson had a poor attendance record and was below average in the performance of his duties, in working harmoniously with others, in working conscientiously and for long hours away from close supervision, in sincerity and integrity, in living within his means and meeting his obligations, in his judgment and quick thinking abilities, and in trustworthiness to handle money. Understandably, Shell would not consider Robinson for re-employment.

All Shell did was honestly report this information to Metropolitan Life at Robinson's request. Now Shell is accused of retaliation for reporting matters that have already been established as true. Should an ex-employee be allowed to shield himself from the truth in the pursuit of another job?

If Robinson were to prevail on a suit on the merits by convincing a jury that Shell's motivation for speaking the truth was retaliation, what should be the remedy? Should Shell be enjoined from speaking the truth about Robinson's poor performance? Perhaps to help Robinson win another

job, Shell should be compelled to lie and state that Robinson's attendance was "average" and he was "average" in the various performance factors. Or maybe "average" is not good enough to convince another employer to hire Robinson and Shell should be compelled to lie and state that Robinson was "above average" in all categories and that Shell would re-employ him.

If Robinson were to prevail on a suit on the merits, what is to stop him from seeking reinstatement with Shell under § 706(g).[45] Then Robinson could return to a job he did poorly and from which he was lawfully terminated.

Perhaps, recognizing that an order compelling Shell to lie about Robinson's performance or re-employ him would be inequitable, a court could order Shell to simply pay Rooinson whatever he would have been paid by Metropolitan Life for as long as he remains unemployed.

Robinson argues passionately for the need of ex-employees to obtain honest employment references. However, there should also be some protection for a former employer against groundless claims of retaliation by a disgruntled ex-employee. This is the balance that various states have sought to achieve through the passage of employer immunity statutes and the development of the common law cause of action of defamation. This balance is also reflected in § 704(a) which limits a cause of action for retaliation by a former employee, as an "applicant for employment," to claims against a prospective employer. This balance would be destroyed by allowing a former employee to sue his former employer under § 704(a).

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[45] 29 U.S.C. § 2000e-5(g).

CONCLUSION

The wording of § 704(a) is unambiguous and the statutory scheme is coherent and consistent. Literal application will not lead to an absurd result nor will it produce a result demonstrably at odds with the intent of Congress. Therefore, the sole function of the Court is to enforce the statute according to its terms.

Robinson would have this Court construe § 704(a) to expand its scope to include former employees. This would be improper. *Iselin v. United States*, 270 U.S. 245 (1926), *majority opinion by Justice Brandeis.*

> "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."
> 270 U.S. at 250 - 251.

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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